THE GEORGE WASHINGTON UNIVERSITY
Washington, D. C.

MINUTES OF A REGULAR MEETING OF THE FACULTY SENATE HELD ON JANUARY 15, 1988, IN LISNER HALL ROOM 603

The meeting was called to order by President Elliott at 2:12 p.m.

Present: President Elliott, Vice President French, Registrar Gaglione, Parliamentarian Schechter, Berkovich, Birnbaum, Burks, Cibinic, Clark, Cohn, Deering, East, Fox, Garris, Grub, Kirsch, Levy, Loeser, Lovett, Moore, Morgan, Paratore, Pierpont, Reeves, Robbins, Robinson, Schiff, Shotel, A. Smith, G. Smith, Solomon, Tolchin, Yezer, and Zubrow

Absent: Barron, Elgart, Liebowitz, and Simons

[At this point the Senate recessed briefly in order for a formal group photograph to be taken.]

APPROVAL OF THE MINUTES

The minutes of the regular meeting of December 11, 1987, were approved as distributed.

DISCUSSION OF UNIVERSITY BUDGET PROCESS AND DECISION-MAKING BY MEMBERS OF CENTRAL ADMINISTRATION

Before proceeding with the discussion, President Elliott said that, unless there was objection, he would remain in the Chair. Hearing no objection, he then explained that he had asked a number of the officers of the administration to respond to various questions submitted by Professor Robinson on behalf of the Senate. It was his goal today to answer as many questions with as much information as possible and, therefore, he had asked that presentations by the officers be made because some of the questions had been regrouped. He indicated that at the conclusion of the presentations, there would be a follow-up discussion in response to questions. President Elliott then read a prepared statement. Presentations followed by Provost Johnson, Director of the Budget Shoup, Comptroller Olmo, Vice President Diehl, Vice President Worth, and Vice President French. (Statements of President Elliott, Provost Johnson, Director of the Budget Shoup, Comptroller Olmo, Vice President Diehl, Vice President Worth, and Vice President French are attached and made a part of these minutes.)

GENERAL DISCUSSION

After a short recess, President Elliott opened the discussion to questions. With reference to the renovation of the Henry Building, Professor Cibinic asked Mr. Diehl whether there had been any attempt to negotiate rates with the National Academy of Sciences; whether a study was done on the cash payout with respect to the $25 million investment and the cost of financing over a period of time versus the rates that were charged; and what length of lease term was now involved in the 74% occupancy. Mr. Diehl replied that there was an attempt to negotiate rates with NAS, but the rates offered were far below what the Finance Committee thought appropriate; the University relied upon outside advisors, e.g., Walker & Dunlop, for information on prospective rental markets and future operations; and the length of lease terms for new tenants was in the range of 5-10 years with none longer than 15 years. Professor Clark asked what the rental figure was for NAS and how that compared with the market figure the University expected to get from new tenants; and what percentage of 2000 Pennsylvania was not under lease. Mr. Diehl responded that the current range in Washington on base rates was $30; the basic Henry Building had gone from $5 to $30 per sq. ft, and the addition had gone from $16 to $30; and the vacancy rate at 2000 Pennsylvania was under 6% which was normal. He also pointed out that the Henry Building would be coming on-line in 1989-90 and would be able to carry itself even if it got no more tenants. Noting that GW's real estate investments were all essentially in the Washington area, Professor Garris asked whether the administration had considered real estate investments outside this area in order to distribute the risk. Mr. Diehl said that the only reason the risk was in one geographical area was that this was where the University owned the land, and he would be most reluctant to recommend investing in more real estate, especially in areas that the University did not know.

Professor Kirsch noted that, in listening to the speakers, the single most important factor was that he did not hear the academic community having any input in some of the very fundamental decisions of the budget process. For example, he said, three departments, Statistics, Political Science, and Economics, were split into several different buildings. A request was made through appropriate channels to put these departments back together in one building. A survey was made after two years, and the administration advised that such moves would be too costly--a half million dollars--and, therefore, could not be done. Professor Kirsch said that he never saw the justification for the cost and he assumed the academic community was never asked whether this request was of sufficient priority so that funds could be spent on this and not on something else. He asked in what way did the deans, as a group, have an opportunity to influence the academic guidelines before the guidelines are given to them. Professor Kirsch said that he

did not hear any overall way for the academic community to be involved in true basic planning for the University.

In order to respond to Professor Kirsch's question, President Elliott turned the Chair over to Professor Robinson. He then said he wished to illustrate his response by describing a situation presently facing the University community. Within the past few weeks, Dr. French was advised by Dr. Rogers, on behalf of the Gelman Library, that it would take $250,000 to $350,000 in additional funds beyond that already budgeted to maintain the present level of acquisitions over the next year and one-half because of the devaluation of the dollar overseas. This meant that Dr. Rogers could not buy as much for the dollar as she did a year ago, and not nearly as much as two years ago when the budget was projected. This illustration, he said, pointed out the obvious--"just what were the priorities?" "Was it more important to consolidate a department, to retain the level of acquisitions of the Library, to upgrade and strengthen faculty salaries, or to go into debt to build more academic facilities?" Dr. Elliott said that these were all urgencies of the budget and he believed that within the next two to five years, there would be some elbow room to respond to these requirements. He assured Professor Kirsch that academic voices were heard loud and clear and that the central administration officers did, indeed, consult with deans about the concerns of the academic community.

Professor Grub asked to what degree the deans were consulted in reaching the decision to increase the salaries of assistant professors across-the-board by $1,500. He said his question was not one of the amount or the level, but it seemed to him that an across-the-board increase could send the wrong signals. Provost Johnson replied that salary reports for the past year clearly showed that professors and associate professors were still at or above the 60th percentile, but assistant professors had lost ground. The Council of Deans was not consulted because it seemed obvious to him, after talking with Dr. French and others, that there wasn't any choice but to raise the salaries at that level. Provost Johnson said that he didn't really know any equitable way to administer salaries whether for faculty or staff. Professor Morgan pointed out that, as Chairman of the Senate Committee which produced Resolution 87/1 concerning faculty salaries, it was very clear that the committee was not calling for across-the-board increases. In striving for academic excellence and recognizing the limitations of resources, however, he wondered how such critically important decisions on academic matters could be made without the input of the academic officers in the planning process. Provost Johnson replied that the administration would be happy to do that now through the planning process. Professor Yezer said that the Committee on Coordinated Planning was not making detailed budget decisions and he was very encouraged about the decision to reschedule the rate at which

some of the items in the current account budget referring to debt retirement were going to appear. With regard to the 10% set aside as a reserve contingency in 89-90, he asked whether that fund would accumulate year-to-year or whether it would be spent each year if not needed for an emergency. Provost Johnson replied that he would be in a better position to respond to that question after the March meeting of the Trustees when the four-year financial plan would have been completed. Right now, he said, the 10%, or $350,000, was being handled as an annual set-aside coming from estimated revenues from investment property.

Professor Deering said he wished to clarify the final disposition of the remainder of the 2% cut in the budget itself. The final figure that would be borne by the academic units, he understood, was approximately $150,000 and he asked how it was determined what academic units would be sharing that burden. Dr. French responded that that was a total arrived at through individual conferences with each dean, with Mr. Shoup, Mr. Johnson, and himself, and that some deans indicated that they could make contributions, while other deans could not. Professor Robbins asked what the expected dollar reduction would be for academic units for the 88-89 budget and for administrators of those units. Mr. Shoup replied that the cuts were to be eliminated for fiscal year 88-89. Professor Levy asked if there was a change in attitude about having contingency funds, and Dr. Elliott explained that there had been a change of policy in that 10% of the income from properties beginning next year would be set aside in the event of a bonafide crisis. Professor Grub inquired whether any consideration had been given to utilizing endowment funds to invest in some additional facilities for instructional needs. President Elliott said that he believed there would be few examples to be found in the United States of private institutions spending unrestricted endowment to build more space. He thought that the Board's Committee on Financial Affairs would look rather dimly at such a recommendation, as would the donors who had a strong orientation that they were contributing to the bank account of the institution, not to paying this month's heating bill or this year's operating deficit. Mr. Diehl commented that, in the past ten years, there had been a total return on the University's securities side of its portfolio of 13.5% a year, of which 6% was income and 7.5% was appreciation. Much of the growth in the endowment fund had come from that internal growth, so the question was whether one wanted to spend that appreciation and take away its ability to produce more income. Professor Yezer pointed out that in FY 1984, total transfers from endowment and gifts into current account was approximately 7% of total current expenditures. In FY 1987 that figure had fallen to 5%-6%. He asked what the forecast was for that number over the next five years. Mr. Diehl

replied that, unless there were major dislocations in the securities market, that number should continue to grow and the income should be stable.

Professor Fox said that he thought this discussion was very helpful and he appreciated particularly Mr. Diehl's presentation in which he explained how decisions were made regarding the rehabilitation of the Henry Building. He thanked all of the speakers for their very informative presentations.

Professor Robinson then yielded the Chair back to President Elliott. In looking at the future, Professor Robinson wondered if there was a scheme envisioned for the systematic involvement of the deans. She noted that concern about the role of the deans and their involvement had been raised repeatedly, and she wondered if there would be something more systematic than the present system or an enlarging of the present system. Dr. French replied that much thought had been given to that by the deans and by some members of the administration. He said that they were on the edge of a significant change in the composition of the Council of Deans and were experimenting with the relationship between it and the Committee on Coordinated Planning. The deans were now invited to each presentation by one of their colleagues of the school's five-year plan and there would be a collective discussion of all of those plans when that process was concluded.

Professor Robinson then expressed her thanks to Senate members for their very thoughtful questions and to all of the administrative officers for their participation and time-consuming preparation of answers. She believed that the discussion had been very enlightening and productive.

President Elliott said that he wished to reiterate one statement made in his prepared comments because he thought it was important now and for the future. He said that the Committee on Financial Affairs of the Board of Trustees was an expert group whose members took their responsibility very seriously and he thought the University community was well-served by these people. Their questions to the administrative officers, he said, were not asked nearly as politely as the Senate's and there was little room for evasion of their meaning. He then thanked the Senate members.

RESOLUTIONS

Because of the lateness of the hour, Professor Robinson moved that discussion of Resolution 87/5, "A Resolution to Alter the Faculty Code, Sections IV-A-3.1-b)-3) and IV-A-4.1-b)&c)," be deferred to the February Senate meeting, and the motion was adopted.

INTRODUCTION OF RESOLUTIONS

There were no resolutions introduced.

INTERIM REPORT BY PROFESSOR ARTHUR D. KIRSCH, CHAIRMAN OF THE SPECIAL COMMITTEE ON MANDATORY RETIREMENT

Professor Robinson recommended that Professor Kirsch's report be presented at the February Senate meeting, and the recommendation was accepted.

REPORT OF THE EXECUTIVE COMMITTEE

On behalf of the Executive Committee, Professor Robinson said that the Committee had been sending additional requests to standing committees and that despite their volume and complexity many issues had and were being resolved. She requested that at the next Senate meeting the chairs of Senate standing committees make interim reports to bring everyone up to date. The next meeting of the Executive Committee was January 29th and she asked that resolutions be submitted prior to that date.

On behalf of Mr. Bellows, Chairman of the Board of Trustees, and Professor Havrylyshyn, Chairman of the Faculty Consultative Committee on Presidential Search, Professor Robinson read a letter from the Faculty Consultative Committee to Mr. Bellows expressing the Committee's strong endorsement of Mr. Trachtenberg as the top choice for nomination for President of the University. (The letter is attached and made a part of these minutes.)

BRIEF STATEMENTS

Despite the Chair's objections, but in response to requests from several Senate members, Vice President French said he wished to put on the record that President Elliott, at the end of his term at the University, would assume the office of President and Chief Executive Officer of the new National Geographic Society Educational Foundation to correct geographic illiteracy in the American public. The President received a round of applause, and Dr. Elliott thanked the members very much.

ADJOURNMENT

Upon a motion being made and seconded, President Elliott adjourned the meeting at 4:32 p.m.

J. Matthew Gaglione

J. Matthew Gaglione
Secretary

Statement by President Elliott to the Faculty Senate on

Friday, January 15, 1988

Since a number of the questions submitted to me regarding the financial affairs of the University seek understanding of the way such matters are handled, a helpful beginning may be a look at the responsibilities assigned by the Board of Trustees to its Committee on Financial Affairs. The following is taken from the Bylaws of the University's Governing Board:

Section 4. <u>Committee on Financial Affairs</u>

a. The Committee on Financial Affairs shall have general oversight of the entire financial, legal, business, and real property affairs of the University.

b. The Committee shall recommend to the Board the appointment of University Legal Counsel for legal matters arising in the management of the University.

c. The Committee shall pass upon the budget estimates of the University for each succeeding fiscal year and shall report its recommendations to the Board at the regular January meeting.

d. The Committee shall have general supervision over the investment of University funds and shall recommend to the Board procedures for the purchase and sale of investments and the appointment of University Investment Counsel to advise on financial matters.

(Elliott cont'd)

e. The Committee shall have general supervision over campus master plans, plans and construction of buildings, and alterations to the University grounds. To it shall be referred all matters relating to the acquisition or disposal of real property.

f. The Committee shall recommend policies for the selection, appointment, compensation, and development of the nonacademic personnel of the University.

It would be my further observation after working with our Board of Trustees for several years that the Committee on Financial Affairs exercises fully the responsibilities assigned to it. They ask for and receive from appropriate officers of the University information and recommendations on these matters but decisions regarding the many areas are made by the Committee. Although many members have expert knowledge in legal, financial and real estate matters, they also call upon other trustees from other committees when such advice may be helpful on a given problem. The University has been and continues to be well served by an exceptionably able committee.

A second matter addressed in different ways among the questions submitted to me is that which relates to the University's overall budget process. Again it may be helpful to outline and review the procedures generally followed.

Following the opening of the fall semester and a review of pertinent data such as enrollment, faculty and staff requirements, finances and all such matters which may have a bearing on the total condition of the University, preliminary

(Elliott cont'd)

plans are pulled together for the following academic year. By early fall, calls are readied for deans and administrative officers to prepare and submit budget requests for the following year, accompanied by overall guidelines as to salary adjustments, other expense items and any unusual situations. These are brought together in late fall and early winter and a full round of hearings is conducted--in past years by the Budget Committee; this year by the Committee on Coordinated Planning. All persons who are responsible for separate budgets--deans and heads of other administrative units--are given an opportunity to defend, explain and project, not only the budget for the succeeding year but such plans as may extend further into the future. Each is also specifically asked what effect the guidelines submitted with the request for the budget itself will have on the programs of his or her unit.

The budget officer is then given the task of assembling the overall budget for the entire University. According to our present timetable broad parameters of the budget, including changes in tuition or other fees, are then presented to the Board of Trustees at its January meeting. Following that meeting, such suggestions as trustees may have are incorporated and the final working budget for the ensuing fiscal year is readied for formal adoption at the Board's March meeting.

(Elliott cont'd)

Unless unforeseen crises develop, that document then becomes the operating budget for the following fiscal year, July 1 through June 30.

It would be incomplete without adding that supplemental items are presented to appropriate administrative officers throughout the year. Responses to such items, of course, must depend upon many factors.

Another set of questions has to do with the extent to which the administration uses credit hours taught, income from grants or contracts, unrestricted endowment or other funds in determining allocations to specific schools, departments or programs. Ratios of income to expenditure clearly constitute a legitimate arena of inquiry. We, and I speak here for the administrative officers of the University, have never used such measures to determine budget allocations. I have not felt confident in using such ratios because of the importance of subjective factors which are difficult of measurement.

Recognizing superior faculty service with above average salary increases is being practiced effectively, however, in some parts of the University. Specifically, I have observed department chairs and program directors who work very

(Elliott cont'd)

conscientiously to reward superior performance. Unfortunately, I have observed others following the all-too-easy across-the-board-increase as well.

The Faculty Senate is aware of Resolution 87/1, submitted to me some months ago by Professor Robinson. It calls for the strengthening of faculty salaries. My reply suggests that the administration might, if working in a strong partnership with the faculty, come to grips with the knotty problem of faculty productivity and thereby make some progress toward the dual objectives of higher salaries and greater recognition of outstanding service. I frankly hope that we can move in that direction. Any such effort will, I believe, include a review of the many academic programs of the University.

Statement by Provost Johnson to the Faculty Senate

January 15, 1988

I want to talk generally about adjustments to this year's budget, excluding the Medical Center. Reductions approximating 2% were made in all divisions except the schools and colleges. After consultation with deans and the Vice President for Academic Affairs we were able to reduce these budgets by only $150,000, and this is being restored where necessary in 1988-89. To make up the additional amount required to balance the 1987-88 and 1988-89 budgets we are recommending that unrestricted gifts and bequests, which normally would go to endowments, be retained in the current fund.

There is concern about the absence of a contingency fund, a reference to bad investments, and the impact of the commercial rental market on academic budgets, all of which are related. As President Elliott noted in his remarks at your meeting on November 6, all revenues have been estimated generously and all have been allocated for expenditure. None was reserved for contingencies. Admittedly, this is risky but school and departmental budgets have benefitted from it.

We know, for example, that income from investment property will be $1,500,000 less this year than was originally estimated because of a problem with one tenant, and that this full amount had been allocated for expenditure. This doesn't suggest that investment properties are a bad investment. Indeed, without them, we would be facing a very bleak future.

We are beginning in 1988-89, however, to set aside a minimum of 10% of the estimated net revenue from investment properties as a cushion.

Now I want to discuss the issue of overexpenditure, underbudgeting and the reference to a caveat in one question - "given that the expenses are necessary, valid costs to support academic programs".

Overexpenditure is a fact, i.e., in a few areas expenditures exceeded the authorized budget. Underbudgeting is a subjective judgement which I suspect most of us make with respect to the budgets for those activities for which we are responsible. The same subjectiveness applies to necessary costs. It is unfortunate that we failed to apply strict controls over expenditures relative to approved budgets, and corrective action has been taken in this area. Managers, at whatever level, cannot be permitted to decide on their own initiative that their division is underbudgeted and use this as a justification for spending in excess of the approved budget.

I need to discuss briefly the future at least through the next four years. The Board of Trustees has asked that we prepare a financial plan for this period (through 1991-92) which will enable the University to operate within its means. The framework for such a plan, consisting of a set of objectives, assumptions and policies, has been outlined and will be discussed at the Board meeting next week. At the March meeting of the Trustees when the 1988-89 budget is recommended for approval a projected operating performance for three additional years will be presented. Preliminary indications are that we will be able to operate at a comfortable level and by the end of 1991-92 have in place a satisfactory contingency fund.

Finally, a word about expectations of additional resources becoming available for academic program development and why they haven't materialized. At the time we began to develop the planning process in earnest it was with the legitimate expectation that the National Academy of Sciences would renew its lease of the Henry Building. Had it done so income from this source would have been significantly higher in this and succeeding years. The fact that our expectation did not materialize does not negate the need for good academic, physical and financial planning.

COMMENTS TO THE FACULTY SENATE
By Robert Shoup, Director of the Budget
At the Regular Meeting January 15, 1988

My comments will address the questions from Categories B & D about the more mechanical aspects of our budgeting process. I will cover briefly three areas:

1. The use of ratio type indicators for financial planning and the budgeting of schools and departments.

2. The method of determining budgets for academic units.

3. The flexibility of the budgets for academic units.

None of this information will apply, of course, to the Medical Center.

1. <u>Ratio Indicators</u>

We have for many years used and distributed various ratios about the financial aspects of the academic units. Most commonly, for example, to support the annual budget hearings the Budget Office has prepared, among other information, Cost per Credit Hour calculations. To relate this cost indicator to our major revenue source, we show the percentage that it is of the hourly tuition rate. And, to show somewhat the composition of cost, we give the percentage of the total cost which is derived from full-time faculty salaries. This information is provided for a four year period for each department, division, and school as appropriate. This is an example of the actual use of ratios

to provide information about costs and relate it to revenues and resources.

The use of tuition revenue in ratio or other analysis is an interesting subject. At GW we actually account for our tuition revenue in two different ways. These are known as "By Major" and "By Teaching Hour". The "Major" approach associates the revenue with the student's home or major division. The teaching approach associates the revenue more with an academic unit according to course registration. Needless to say, there is considerable variation between the two approaches. For instance, in fiscal year 1986-87 one school had a ratio of tuition revenue to expense budget of eight tenths (.8) to one on the "teaching" basis and a ratio of three (3) to one on the "major" basis. Ratio analysis will provide quite different messages depending on which revenue measure is used. My point is simply that care must be exercised to avoid confusion and more discussion is needed to settle just how we want to view ourselves. Neither approach can be labeled all right or all wrong.

2. Budget Determination

As mentioned by President Elliott, we do not determine budgets by a formula method. We use a method called "line item incremental" in which each existing budget is increased by certain guideline percentages applicable to the different expense types - such as Salaries, Stipends or other expenses.

Also, additional funding may be requested through supplemental requests which in the past were reviewed by the Budget Committee. The new planning process is intended to provide the review and coordination of differential program increases in the future.

The academic deans have always been involved in the budget process as Dr. Elliott has mentioned. Further, since the central budget process focuses on budgeting at the division or school and college level, most questions regarding differences between budgets of academic departments should be addressed to the deans.

3. Budget Flexibility

Academic units are free to reallocate the funds within their budgets subject to some restrictions on the salary, fringe benefit, and telecommunication accounts. Salaries associated with vacancies may be used only for replacement personnel such as part-time or temporary personnel. Fringe benefits allotments may not be transferred for other purposes nor can the "non-long distance" component of the telecommunication accounts.

There is a special case regarding regular faculty salaries. Sometimes these funds are unused in a department operating budget due to the participation of a faculty member in an activity with outside funding. To the extent that the "released" funds are not needed for replacement faculty they may be spent by the department for any other purpose during the current period. Also, one half of these funds remaining unspent in the current

period may be transferred to the departments E & R account at the end of the year.

I will answer one more question directly. The University central budget system has never had much compatibility for the reduction or consolidation of budgets. Certainly, no under-expenditure in one year ever caused a reduction of the subsequent year budget.

This completes my comments.

COMMENTS TO THE FACULTY SENATE
by Ralph J. Olmo, Comptroller
January 15, 1988

MY COMMENTS WILL DEAL WITH A FEW QUESTIONS RAISED REGARDING FINANCIAL REPORTING (AS OTHERS HAVE MENTIONED, THIS DISCUSSION EXCLUDES THE MED CTR.)

THE DECREASE IN OPERATING FUND BALANCE REPORTED TO THE BOARD OF TRUSTEES FOR JUNE 30, 1987 AMOUNTED TO $2,445,560. I SHALL RESPOND BRIEFLY TO SPECIFIC QUESTIONS RELATING THERETO. FIRST, OUTLAYS ASSOCIATED WITH LOAN PRINCIPLE REDUCTIONS AND CAPITAL ADDITIONS ARE INCLUDED IN THAT DECREASE. IT IS NOT THE "TOTAL" COLUMN OF THE STATEMENT OF CHANGES IN FUND BALANCE OF THE ANNUAL REPORT BUT THE UNRESTRICTED CURRENT COLUMN. OUR FINANCIAL STATEMENTS, OF COURSE, ARE PRESENTED IN ACCORDANCE WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES. PRIVATE HIGHER EDUCATION INSTITUTIONS DO FACE A CHANGE IN ACCOUNTING PRINCIPLES WITH REGARD TO DEPRECIATION EXPENSE, BUT OUR CURRENT THINKING IS THAT THIS CHANGE WILL HAVE NO EFFECT ON THE CURRENT FUND OF THE UNIVERSITY AND THUS WILL NOT CHANGE THE DEFINITION OF "DEFICIT". IT MUST BE UNDERSTOOD THAT IRRESPECTIVE OF ANY ADJUSTMENTS MADE TO THE FINANCIAL STATEMENTS IN FORM OR TO

THE BOTTOM LINE, IT WILL HAVE NO EFFECT ON THE SUBSTANCE OF THE CASH FLOW BUDGETING REQUIREMENTS OF THE UNIVERSITY.

GWU'S FINANCIAL PICTURE IS FUNDAMENTALLY SOUND, ENDOWMENT FUNDS HAVE STEADILY INCREASED (AND BY DEFINITION ALL ENDOWMENT FUNDS ARE RESTRICTED EITHER BY THE DONOR OR BY THE BOARD OF TRUSTEES), ENROLLMENT IS STABLE (ABOUT 90% OF OUR OPERATING REVENUES COME FROM TUITION), AND OUR PHYSICAL PLANT IS GROWING. HOWEVER, WE ARE NOT LIVING WITHIN OUR MEANS, THE INFLOW OF CASH IS NOT KEEPING UP WITH THE OUTFLOW OF CASH. THE OPERATING DEFICIT HAS CUMULATED TO APPROXIMATELY $10,000,000 AND THE V.P. - TREASURER HAS BEEN FORCED TO BORROW TO MEET OPERATING CASH REQUIREMENTS FOR THE FIRST TIME IN MANY YEARS. THIS PROBLEM IS MANAGEABLE AND NOT URGENT, BUT ADJUSTMENTS OF SOME APPROPRIATE SORT ARE NEEDED. THE UNIVERSITY HAS DEVELOPED SATISFACTORY PLANS TO DEAL WITH THIS MATTER WHICH INCLUDE RESTRUCTURING DEBT AND REDIRECTING CONTRIBUTIONS ON A TEMPORARY BASIS. THESE AND OTHER MEASURES BUY TIME FOR THE UNIVERSITY TO GET REVENUES AND EXPENSES INTO BALANCE BUT THESE ACTIONS ARE ALSO EQUIVALENT TO MORTGAGING A HOME TO FINANCE FAMILY LIVING EXPENSES AND WOULD NOT BE HEALTHY IN THE LONGER RUN.

CHARLES E. DIEHL
VICE PRESIDENT AND TREASURER
THE GEORGE WASHINGTON UNIVERSITY

REMARKS TO FACULTY SENATE
JANUARY 15, 1988

There have been questions proposed concerning the drain on the academic budget from ups and downs in the cash flow of the commercial real estate properties. This needs to be put into perspective.

Going back ten years to 1978, we had roughly $400,000 coming in from real estate and $900,000 coming in from our investment in securities for a total of $1,300,000. That has grown in the past ten years to income from real estate in 1987 of $4,000,000, while cash and securities produced $6,900,000 for a total of $10,900,000. So when one speaks of a drain on the academic budget, I am at a loss to explain a drain when in fact there have been increasing positive flows to the budget every year from our endowment funds.

The question has been posed of how do we eliminate the peaks and valleys in the real estate market. The answer is that you really can't. It comes with the turf. For example, the National Academy of Science lease, which was for 20 years, provided a constant stream and gave us no inflation protection. Yet we were still faced with a set term in which the tenant could and did move out of the facility, beyond the control of the University.

A similar situation exists with the Edison building. We have a 30 year lease that expires in the year 2003 and at that time the rent goes to market. Pepco could well decide that they don't want to stay in that building. We would be faced with having to re-lease it. In that case, there would be a very minor disruption to cash flow because the dollars involved are minimal. That lease was also done when inflation protection was not written into leases. Both Henry and Edison leases were written at a time when the only way we could get financing was to have a lease term that matched the term of the mortgage.

That is a principal reason in the planning for 2000 Pennsylvania Avenue that we made the decision that we didn't want a single tenant to be in the building. The Committee on Financial Affairs believes, and so do I, that the development of office buildings with multi tenants who move and change over time is the best way to match inflation, and minimize cash flow changes. Since 1983 we have had about a 15% change in tenants in 2000 Pennsylvania Avenue. Although there are costs in tenant changes, rents go to current market as tenants turn over.

We are taking the same action in 2100 Pennsylvania Avenue on leasing. We don't want a single tenant to control the whole project. At the current moment, we have signed up four major tenants for over 200,000 of the 295,000 square feet that are in the building. We will fill in the balance with smaller tenants which will moderate the disruption of cash flow as leases expire in 5, 10 or 15 years.

The Committee on Financial Affairs also believes that the real estate investments provide insulation from the vagaries of the securities markets, a view shared by every major endowment fund. I don't think I need to mention October 19, 1987, to make that point.

Insulating the University from changes in cash flow, or extraordinary expense, has to be done by establishing contingency reserves. We can't spend every dime that we take in each year. We have absorbed in our budget every year the additional endowment income money from the $1,300,000 level in 1978 to the $10,900,000 last year. All of that new money has gone to support the University, principally in the area of academics or for academic support purposes.

Our real estate investments are one of our principal sources of new income to provide for debt service in the buildings we have constructed. To give you some idea, in 1987-88 we will expect from 14th and H Street, the old Medical School site, about $656,000, from 2000 Pennsylvania Avenue, even with the tenant problem of this year, $2,300,000, and from Edison which is on long term lease $341,000 for a total of $3,350,000. In 1988-89 those numbers will escalate to about $3,800,000.

Questions have been raised as to the planning of the Joseph Henry Building and what sort of advice and assistance did we have on this project. The first level of advice, as President Elliott has indicated, came from the Committee on Financial Affairs of the Board of Trustees. The Committee has the responsibility for the University's investments and financial matters. Our decision process in regards to the Joseph Henry Building renovations really started in 1984, when we began discussions with the National Academy of Sciences about their future intentions. At that time NAS was very vague and would not make a positive commitment either to stay or to go. In fact NAS did not make that determination formal until the exact time called for in their lease, which was 18 months prior to their departure. As a result of their indefiniteness, we took a look at what we might do in terms of alternate use. We examined whether we should try to find another government agency or get the World Bank or International Monetary Fund to move into the building.

The building was really constructed for governmental type use rather than speculative office building use by the layout of its corridors and service areas, its lobbies and in the quality of its interiors. We also examined the advantages of putting it in the commercial market.

One advantage (as we have already discussed) of its becoming a multi tenant building is the lessening of the impact of change as tenants moved. Second, that the real estate rates for commercial tenants are much better than they are for government tenants over the long haul. Third, it would give us inflation protection as rents move to market as change takes place.

The people that we relied on to develop the information that we presented to the Trustees, were the design firm of RTKL, one of the largest design firms in the United States which specializes in real estate development and has as clients many major developers. We also relied on Walker & Dunlop to provide us with information on the prospective rental markets and the future operation of the property. We conducted discussions with knowledgeable trustees, both on the Finance Committee and those who were in or knowledgeable of the development area. We prepared preliminary plans and cost estimates of what it would take to do this project.

At this point, I should like to point out that each one of these real state ventures, starting with the Joseph Henry Building, has been financed without using University operating funds. In the case of the Joseph Henry Building, we were able to mortgage out the property , which means that we got more mortgage money than we had spent, and therefore were able to recoup the cost of the land. The same thing was done in financing the Thomas Edison Building.

The monies to do 2000 Pennsylvania and the addition to the Joseph Henry Building came from the sale of the land that we had rezoned for the World Bank at 19th and F. The conversion of the Joseph Henry to a first class office building which is now underway is going to be borne by a loan that will probably reach $25,000,000. Included in that loan are all of the carrying costs during the startup period, including interest and operating costs until the building generates positive net cash flows, which we expect to occur in 1989-90 fiscal year. We now have tenants signed up for 74% of this project which should guarantee our cash flow projection.

In summation, we have had professional help and assistance, not only from the trustees but from external sources on all of our building projects. Further, we have been able to develop these real estate properties without any drain on operating budgets.

The question has been raised about why we didn't use the Joseph Henry for academic purposes. Well, there are a number of reasons. First, this property is zoned for commercial use and our University policy is that we will use the more expensive commercially zoned land for commercial use until no other land is available. This policy helps us in our relations downtown with the District. The District does not like to see tax exempt land. If we start to use commercially zoned land for University use, it depreciates the city's tax base more than residentially zoned land.

In addition to the political issue, there is a more practical reason at this time to keep the Joseph Henry Building in income producing status. That income stream has been projected to be used to support our debt. The alternative use by the University would deny us that income stream. Further, it would add $2,400,000 to our budget for operating the building, not to mention the $15-20,000,000 capital investment required to convert it into University use with classrooms, office rearrangements, and/or laboratories.

Another question asked is what buildings have been purchased over the past several years. The list of those buildings purchased in 1984 and to date is as follows:

607 22nd Street
833 22nd Street
2327 Virginia Avenue
2033 F Street
2035 F Street
2037 F Street
612 23rd Street
2145 G Street
2121 H Street
2134 Pennsylvania Avenue
2136 Pennsylvania Avenue

The properties have been purchased through a loan that has been approved by the Finance Committee and the dollars for this activity are in the budget.

The next question that was raised concerns the Support Building and what did it cost. It cost $2,800,000. On the question as to its need, the reason it was built was that when we built 2000 Pennsylvania Avenue, we wiped out our support areas for the University.

For a long period of time, our mechanics were forced to maintain our vehicles out in the open---in rain, heat or snow. We needed adequate space for our grounds and transportation people and for our supply and storage here on campus. We had no central place for our housekeeping or our mail functions that were adequate for the workplace, or in terms of minimal creature necessities. We recommended, and the Committee on Financial Affairs agreed, that the service function had to have a facility that could support the University and that would provide adequate housing for our support people.

What is our financial commitment to the Loudoun Campus? At this stage we have spent something over $200,000 on planning and legal matters. That in essence is the only financial outlay we have to make.

The financing of the project itself, if it comes to fruition, will be through a participation in the project. We are to be given 50 acres of land, have an option to buy an additional 75 acres at the developer's cost, and participate in 20% of the development income from the project, including any land sales. Projections on the project are that we would receive over $1,000,000 a year which would finance initially about $15,000,000 of construction and equipment for the first building proposed at the site.

Budgets prepared indicated that the current operating expenses would be covered either by research or teaching activities that would go on at the site. The planning funds would be reimbursed out of the construction financing that will be undertaken if the project is successful.

It has been suggested that we examine our debt to determine if we can stretch out principal payments. Last spring we began looking for ways to obtain less costly financing on our real estate loan. We also began to examine our existing debt. When it became apparent during the summer that we were having difficulties with our budget, we began discussions with financing institutions on debt restructuring. Last Tuesday the Committee on Financial Affairs approved a debt restructuring plan that will enable us to reduce principal outlays over the next three years. This will provide us with a margin that will permit us to reduce our existing deficit in the current fund balance, an objective we have not been able thus far to achieve, although it has been a part of our financial plan each year.

Throughout the questions to which I have been asked to respond, comes a constant theme: How do we protect ourselves from economic setbacks? We have exposure to interest rates because we have a lot of variable rate debt. We are subject to inflation. We are tuition dependent like every other private University. I would like to answer by saying that we can only protect ourselves is by creating contingency funds, and not spending every new dime we get. That's the appropriate thing to do. I am sure that each of you would support that step, even though it means that in future years we will not be able to do all of the things that we would like to do, in order to build up an appropriate contingency fund.

<u>Remarks to the Faculty Senate, January 15, 1988</u> - Vice President Worth

My remarks are primarily responsive to the category E question as it concerns the Campaign for George Washington. I have distributed to you a summary of the Campaign goals showing our progress toward these goals at this point. The Campaign officially began in July, 1985, and concludes in June, 1990, so we have just passed the half way mark in time, with about 62% of the dollar goal having been raised. This is good progress. We have reason to be optimistic, but not sanguine, about eventual success. This success results from the dedicated work of many individuals, including a number of you in this room today who have played important roles.

I wish to clarify two important points. First, the Campaign goals were developed by the University administration and were then reviewed and approved by the Board of Trustees <u>as University policy</u> for the years 1985-1990.

In view of these goals, it is really a misnomer to describe the Campaign as a "capital campaign." Rather, like most modern University campaigns, it is what we call a "total" or "comprehensive" campaign because it includes goals related to <u>both</u> capital objectives <u>and</u> current budgetary needs.

Of the $75 million overall goal, only $45 million is for capital purposes. And in this context, "capital" means primarily endowment, not bricks and mortar. Capital goals include $36 million for endowment and $9 million for facilities improvements and equipment. $30 million of the $75 million overall goal represents gifts to support current purposes in the years 1985 through 1990. These gifts are, in general, expended in the same year they are received, and as the Campaign summary indicates, most are designated to support specific departments or programs, or specific purposes such as libraries or student aid.

And so the total or comprehensive campaign is not a situation in which we are seeking capital gifts in competition with the Annual Fund, diminishing support for current needs. Rather, it requires that we _increase_ gifts for current operations every year even as we _also_ raise funds for the endowment. The momentum and intensity of the Campaign enable us to raise _more_ for _both_ purposes than would otherwise have been possible. And fortunately, as the material distributed indicates, the Campaign is on schedule and meeting its goals for _both_ types of support.

To answer the category E question directly, there was no _decrease_ in unrestricted gifts in 1986-1987, as has already been noted here today. Unrestricted gifts to current operations increased by more than 6% in

1986-1987, as they have in every recent year. Despite this increase, unrestricted gifts totalled less than had been provided for in the budget. It was the budget figure which was, in retrospect, overly optimistic in this regard. Unrestricted gifts have met the levels called for by the Campaign goals.

The category E question asks if there are Campaign gifts which might be "reprogrammed" to meet current needs. As the Campaign summary shows, most gifts have been designated for rather specific categories and are thus not available for redirection.

An exception to this are unrestricted bequests, received as a result of donors' wills. They are, quite obviously, not predictable and thus it would not be prudent to generally rely on them to meet current budget needs. For this reason, the University has maintained the prudent policy of transferring such bequests to endowment. They then generate income which <u>does</u> add to the operating budget in subsequent years.

The total shown under unrestricted endowment on the Campaign summary includes just over $1 million in these bequests, with the balance coming from gifts which were <u>specifically</u> <u>designated</u> for endowment and which are thus <u>not</u> available to meet current needs.

This policy on unrestricted bequests is not only a wise financial practice but, I believe, it keeps faith with our benefactors as well. It is my impression and my belief that most individuals who leave a bequest to the University, whether it is specified for addition to the endowment or not, do so with some expectation that they are adding to the permanent and lasting strength of the University and not just helping to underwrite this year's operating budget.

The President has already indicated that he will ask the Board of Trustees for permission to alter this policy in the short run in order to use new gifts of this kind for operating needs. But this is only intended as a short run exception to the policy and cannot be viewed as a lasting solution to budgetary problems.

I hope that I have responded to the question posed in category E, at least those aspects of it dealing with the Campaign. I will be pleased to answer any other questions that you may have.

3047w

Distributed by Vice President Worth at the Faculty Senate Meeting 1/15/88

THE GEORGE WASHINGTON UNIVERSITY

CAMPAIGN FOR GEORGE WASHINGTON

	GOAL 1985-1990	TOTAL RAISED 7/1/85 - 1/13/88 (GIFTS & PLEDGES)	PERCENT OF GOAL RAISED
I. CAPITAL PURPOSES			
A. Endowment to Support:			
Professorships	$10,000,000	$5,332,189	
Student Assistance	10,000,000	7,709,148	
Libraries	4,000,000	942,950	
Research	4,000,000	807,224	
Faculty & Program Enrichment	2,500,000	3,333,412	
Facilities Maintenance	2,500,000	1,728,362	
General Endowments	3,000,000	--	
University	--	2,058,240	
Schools	--	1,975,784	
TOTAL ENDOWMENT	$36,000,000	$23,887,309	66.4%
B. Academic facility improvements, educational & research equipment	$9,000,000	$3,072,655	34.1%
TOTAL CAPITAL PURPOSES	**$45,000,000**	**$26,959,964**	**59.9%**
II. SUPPORT FOR CURRENT OPERATIONS (TOTAL FOR 1985-1990):	$30,000,000	--	
A. Unrestricted to university	--	$2,788,296	
B. Unrestricted to schools	--	$2,274,852	
C. Restricted to support specific programs, departments & purposes	--	14,255,084	
TOTAL CURRENT OPERATIONS	**$30,000,000**	**$19,318,232**	**64.4%**
TOTAL OVERALL CAMPAIGN	**$75,000,000**	**$46,278,196**	**61.7%**

Statement by Vice President French to the Faculty Senate
January 15, 1988

ACADEMIC COMPENSATION

The first point to be made is that deans are the key decision makers in the determination of faculty compensation. Deans of course consult closely with department chairs or program directors, and they must operate within budget constraints and in terms of administrative guidelines. Each year when the percentage increase in the salary line of the annual budget has been established that number is communicated to the deans along with certain instructions.

Let me quickly recapitulate those guidelines from the last 4 or 5 years to give you a specific sense of what our policy has been.

[Dr. French read the text of the instructions for AY 85-86 and AY 88-89.]

You can see from these instructions that all of the new salary funds are available for differential increases on the basis of merit or "productivity." (Special distributions, e.g., to bring up one rank, have additional allocations.) I can assure you after four years in this job, that it is increasingly the practice in every school to relate annual increases to assessments of relative performance. At least one school has a structured formula for determining that assessment.

On the question of compensation for more distinguished individual members of the faculty in relation to administrative salaries, I can tell you, as the one who signs all appointment letters, that it is noteworthy each year how many faculty are being compensated at rates above those used to pay academic officers, including vice presidents. If you convert AY salaries to fiscal rates, we are talking about scores of cases in which that is true—even excluding the Medical School.

So much for present practices. The more important concern is the future. The reason we have left this question to last is not because it is of minor consequence, but because the President's opening statement asked for a thorough study of broad-guaged measures of "faculty productivity." If we do that, it will open a new era in the calculation of faculty compensation on our campus.

COMPUTER FEE

The second "five-year plan" developed by the old Academic Advisory Committee to the Center for Academic and Administrative Computing covers the years 1984 through 1988. The plan called for both substantial enhancements of the central computing facility and the installation of one remote computer classroom each year. (It is important to realize that the Committee asked that roughly twice as much be invested in CAAC as in the start up costs for computer classrooms.) The administration responded that the only way those recommendations could be implemented would be through the collection of a student user's fee. The Committee, very reluctantly, agreed to go ahead on that basis.

The fees were first collected in the 1984-85 academic year; they totalled a little more than one-half of the projected revenue requirement. In that year, in addition to new equipment in the Computer Center, the first classroom was installed in Rome Hall. In 1985-86 the second classroom was installed in Monroe Hall. In 1986-87, by agreement with the Advisory Committee a third classroom was not installed but CIRC/US was created with an ongoing operating budget that has now reached almost $350,000 per year. (That of course is a continuing expense, and it is approximately the amount collected last year through the computer fee, excluding the fees collected for and returned to the School of Engineering and Applied Science.) Furthermore, also in 1986-87, all of the machines in Rome Hall were replaced with new computers with superior graphic capabilities. (The old machines were "sold" to the Gelman Library.)

In the current year, before the budget difficulties were encountered, we intended to construct a third classroom equipped with Macintoshes. That project has been deferred, but, as it happens, the Apple corporation has made a gift of some 28 machines to three different units of the University giving us more Macintosh resources than we would otherwise have had at our own expense. Moreover, later this year or early in the next fiscal year we have no choice but to do substantial replacements if not a total replacement of the machines in the Monroe classroom. (I might also note that thinking on the campus has changed somewhat as to whether we need "computer classrooms," as those were originally conceived, or rooms that can be used for class-related study assignments.)

At any rate, our present plan is to continue to collect the full user's fee through AY '88-89 in order simply to maintain our present academic computing resources. Beyond the period of the current five-year plan, consideration is being given to reducing the fee or eliminating it altogether.

GWTV

There are two important parts to the background for the decision to develop the University's own educational television capabilities in the early 1980's.

(1) The instructional television facilities came into being as just one part of an ambitious, comprehensive Center for Telecommunication Studies that also had a library component, a research program and a policy studies agenda with a number of prospective corporate participants. The Center was subsequently disbanded leaving the ITV facility as a freestanding unit.

(2) Around 1980 the University began to experience a decline in revenues from off-campus programs. In the preceding 15 years those programs had produced from 1 to 4 million dollars for the annual operating budget. One contributing factor was SGBA's discontinuance of all off-campus degree programs in 1979 in preparation for accreditation of their graduate programs. Off-campus registration fell from 6,215 to 2,724 from '78-79 to '82-83. Furthermore, there was increasing competition from the University of Maryland and George Mason University in the form of televised course offerings.

Consultants and staff of the Division of Continuing Education prepared a thorough analysis of costs and a marketing plan for a five-year period. There was a general conviction that we should be able to more than hold our own through this medium. On the basis of that advice, President Elliott authorized an application to the FCC for the ITFS channels and the construction of the studios in the Academic Center. It was assumed that virtually every school in the University would use the channels for either continuing professional education or off-campus degree programs.

The decision to go ahead in 1982 had to be made quickly while channels were still available. We managed to obtain licenses for 8 frequencies. There are virtually no unassigned channels left in this metropolitan area. Our frequencies represent a very valuable present and future asset for the University.

Our one great frustration has proved to be the inability to broadcast a sufficient "menu" of courses for clients who want their employees to be able to complete a master's degree via this medium. As is usual in human failures, this is a complicated matter with no single culprit. The important point is we think we now know how to break out of this chicken-and-egg circularity trap.

Assistant VP Christensen and representatives of the Schools of Engineering, Education, Business and Medicine are discussing plans that could liberate us from present constraints and enable us to realize the long-delayed potential in off-campus enrollments. It would enable us to reduce personnel costs by more than 2/3 for each course and more importantly accommodate the classroom requirements of EE&CS.

In the meantime, I would like to give you 4 or 5 numbers. (1) The current annual operating budget of GWTV is $946,000. This includes salaries

for three positions for maintenance engineers for the academic facility in "the church." (2) The station performs numerous services for faculty and programs in all schools without charge. If we had recovered costs for those services over the last six months alone, the income to the station would have been $244,000. (3) Tuition income from televised courses in the current semester will be about $25,000. (4) Income to Continuing Engineering Education from teleconferences and tapes done with the staff and facilities of GWTV over the last six months alone has been $590,000. Twelve more teleconferences have already been scheduled for 1988. (5) Services performed on a fee basis for non-university clients over the same period has produced another $45,200.

We should also remember that with the completion of the ISN we now have the ability to transmit instructional video materials from GWTV into 120 classrooms and conference rooms around the campus.

In summation we have a valuable, versatile resource in GWTV the full instructional potential of which has yet to be realized. However, we have demonstrated the revenue potential of the facility sufficient to buy time for Mr. Christensen and his colleagues to find ways to serve the original educational objectives of the venture.

THE
GEORGE
WASHINGTON
UNIVERSITY

Washington, D.C. 20052 / ***Department of Economics***

Memorandum

TO: Mr. Everett Bellows, Chairman, Board of Trustees

FROM: Oli Havrylyshyn, Chairman, Faculty Consultative Committee on Presidential Search

I wish to thank you for arranging the lunch meeting with President Trachtenberg on Wed. Jan. 12th, which all the Committee found extremely interesting, exciting, and useful.

The Committee asked me to convey to you the following resolution:

"The Faculty Consultative Committee wishes to express its strong endorsement of President Trachtenberg as the top choice for nomination for President, and its appreciation to the Board of Trustees Search Committee for its extensive and expeditious efforts in conducting this very successful search."

cc. Prof. Robinson, Chair, Executive Committee, Faculty Senate.

THE GEORGE WASHINGTON UNIVERSITY
Washington, D. C.

The Faculty Senate December 23, 1987

The Faculty Senate will meet on Friday, January 15, 1988, at 2:10* p.m., in Lisner Hall 603.

AGENDA

1. Call to order

2. Approval of the minutes of the regular meeting of December 11, 1987

3. Old Business:

   Discussion of University budget process and decision-making by members of central administration

4. Resolutions:

   A RESOLUTION TO ALTER THE FACULTY CODE, SECTIONS IV-A-3.1-b)-3) AND IV-A-4.1-b)&c) (87/5); Professor Stefan O. Schiff, Chairman, Appointment, Salary and Promotion Policies Committee (Resolution 87/5 attached)

5. Introduction of Resolutions

6. Interim Report by Professor Arthur D. Kirsch, Chairman, Special Committee on Mandatory Retirement (Interim Report attached)

7. General Business:

   Report of Executive Committee: Professor Lilien F. Robinson, Chairman

8. Brief Statements

9. Adjournment

J. Matthew Gaglione

J. Matthew Gaglione
Secretary

*NOTE: Prior to the meeting, a formal group picture of the Faculty Senate will be taken at 1:45 p.m. Please try to arrive by that time.

A RESOLUTION TO ALTER THE FACULTY CODE, SECTIONS IV-A-3.1-b)-3) AND IV-A-4.1-b)&c) (87/5)

WHEREAS, greater clarity of intent can be achieved by re-ordering and re-wording Sections IV-A-3.1-b)-3) and IV-A-4.1-b) of the Faculty Code; and

WHEREAS, the University can make itself more competitive in the recruitment of new regular faculty by permitting the offer of tenure to associate professors at the time of initial appointment (Code Section IV-A-4.1-c));
NOW, THEREFORE

BE IT RESOLVED BY THE FACULTY SENATE OF THE GEORGE WASHINGTON UNIVERSITY:

(underlining indicates amendments)

(1) That Section IV-A-3.1-b)-3) of the Faculty Code be made Section 1, i.e., the lead-off paragraph in Section IV-A-3.1-b), and the other sub-sections re-numbered accordingly; and

That new Section 1 read:

"1) A faculty member with more than three years' previous full-time service at another institution may be appointed at any rank below that of professor without tenure for four years as a term or condition of his or her initial appointment, even though his or her total period of service in the academic profession is thereby extended beyond seven years." and

(2) That Section IV-A-4.1-b) of the Faculty Code be re-worded to read:

"b) Assistant Professors
Assistant Professors shall be appointed for a period of not more than three years, and may be reappointed ~~with or~~ without tenure for one or more additional periods." and

(3) That Section IV-A-4.1-c) of the _Faculty Code_ be re-worded to read:

"c) Associate Professors
Associate Professors ~~shall~~ _may_ be appointed _with tenure or_ for a period of not more than four years _without tenure_, and may be reappointed ~~with or~~ without tenure for one or more additional periods."

December 7, 1987
Committee on Appointment, Salary and Promotion Policies

THE
GEORGE
WASHINGTON
UNIVERSITY

Department of Statistics/Computer and Information Systems

Washington, D.C. 20052
(202) 994-6356

MEMORANDUM

TO : Executive Committee
FACULTY SENATE

FROM: Professor A.D. Kirsch *A.D. Kirsch*
Chairman, Special Committee To Study
Mandatory Retirement

DATE: November 30, 1987

The committee, and its various subcommittees, has met several times during which we have:

1. Prepared a table showing faculty participation in retirement plans, by rank and age. It is apparent that many faculty are not contributing beyond the minimum 5%, and that a surprising number are not contributing at all. We feel that some effort should be made (by the ASPP committee, for example) to encourage a greater participation by all the faculty. (Note: In 1989 the University will begin contributing 10% for all employees, but this will not provide enough income for most faculty if they wish to be able to retire at any moderately early age). (See Table 1).

2. Prepared projections of the numbers of faculty reaching age 70 (and intermediate ages) for the next several years. These projections are made assuming recent trends will continue; the projections of the numbers reaching age 70 could easily prove too conservative if the country were to have high inflation, or too large if the University provides incentives to retire early. (See Table 2).

3. Written a letter to the University counsel requesting clarification of some of the legal issues involved in the recent changes in the Age Discrimination Act and other topics. (See Memo of March 12, 1987 to Thomas Quinn). We received a reply September 3, 1987 in which Mr. V. Burke discussed several of the issues we raised (reply attached). The two most important aspects of this reply are:

   1) "For reasons stated previously I think it premature to do anything which would fundamentally alter the existing tenure system at this time."

   2) "Buy-out packages which are totally voluntary should not present an ADEA problem...."

4. Had discussions with the Associate Secretary of the AAUP and received the information that they would be meeting with the Association of Universities during the coming year to discuss the position they will take at any hearings. As of October, not only had the study recommended by Congress not been started, the membership of the committee to do the study had not been set. Mr. Kreiser, the Associate Secretary, said that he is recommending no action on tenure programs be taken at this time, and sent us a "Working Paper on the Status of Tenure Without Manditory Retirement" which was published in ACADEME in July - August, 1987. Included in this article is the suggestion that universities "should start to develop and utilize...buyouts" (See attached letter and article).

5. Conducted discussions with several faculty nearing retirement (0 to 6 years). The most common worry was about health insurance benefits. Many comments were made about early retirement if the health benefits, including major medical, could be continued by the university. Additional comments included some worry about inflation after the next election. No interviews have been conducted since the stock market slide.

When all of the above were considered at our last meeting, the committee recommended going to the Senate with this interim report and requesting that our charge be reduced in scope to looking into ways of achieving early (or partial) retirement packages that would be appealing to both faculty and the University. At the same time, we wish to stress concern for these faculty not wishing to retire who are able to continue to contribute to their disciplines as well as to classroom teaching. In addition, we recognized the problem that dealing with those whose competency diminishes and who do not voluntarily retire may require revision of existing proceedures. These three issues could either be continued to be studied by this special committee, or assigned to the appropriate standing committees of the Senate (such as ASPP and Administrative Matters as they Affect the Faculty).

TABLE 1.

DATA AS OF MARCH 31

TOTAL

Contributions:
Basic = 5%
Volun = More than 5%
None = No Contribution

	RANK															
	PROFESSOR			ASSOC PROF			ASST PROF			INSTRUCTOR			TOTAL			
	RETIREMENT PLAN			RETIREMENT PLAN			RETIREMENT PLAN			RETIREMENT PLAN			RETIREMENT PLAN			
	BASIC	VOLUN	NONE	BASIC	VOLUN	NONE	BASIC	VOLUN	NONE	BASIC	VOLUN	NONE	BASIC	VOLUN	NONE	TOTAL
	#	#	#	#	#	#	#	#	#	#	#	#	#	#	#	#
AGE																
< 40	3	2	0	37	17	9	64	31	30	13	2	14	117	52	53	222
40-44	24	19	3	49	33	8	13	5	3	4	2	2	90	59	16	165
45-49	38	44	0	26	16	6	3	2	1	2	0	0	69	62	7	138
50-54	44	36	1	10	5	3	3	2	0	0	1	0	57	44	4	105
55-59	41	43	2	8	14	1	2	1	1	0	0	1	51	58	5	114
60	5	11	0	2	1	0	1	0	0	0	0	0	8	12	0	20
61	5	3	0	0	2	0	0	0	0	0	0	0	5	5	0	10
62	8	5	0	3	3	0	0	0	0	0	0	0	11	8	0	19
63	4	7	0	0	1	0	0	0	0	0	0	0	4	8	0	12
64	2	12	1	1	0	0	0	0	1	0	0	0	3	12	2	17
65	1	8	0	0	0	0	0	0	0	0	0	0	1	8	0	9
66	5	2	0	0	0	0	0	0	0	0	0	0	5	2	0	7
67	0	4	0	0	1	0	0	0	0	0	0	0	0	5	0	5
68	4	0	0	0	0	0	0	0	1	0	0	0	4	0	1	5
69	0	8	0	0	1	0	0	0	0	0	0	0	0	9	0	9
70	0	3	0	0	0	0	0	0	0	0	0	0	0	3	0	3
TOTAL	184	207	7	136	94	27	86	41	37	19	5	17	425	347	88	860
40 + over	181	205	7	99	77	18	22	10	7	6	3	3	308	295	35	639

TABLE 2. Oct. 1987

To: Committee
From: Kirsch and Goldfarb

Subject: Some Very Tentative Estimates of the Number of Faculty Reaching Age 70 in the Near Future.

The attached table represents an attempt to use existing data about the age distribution of faculty to get some idea of the number of faculty reaching age 70 in the near future. The numbers in the first 8 rows--labelled 80-81 through 87--represent real data. Thus, for example, the number "10" in the third cell of the third row represents the actual number of faculty who were age 68 in the 1982-83 academic year.

The numbers in row 9 and below (1988 through 2001) represent estimates of the number of faculty at various ages in each of the listed years. These estimates were derived based on the patterns of retirement displayed in the actual data in the first eight rows. Thus, the estimates in rows 9 and below are based on the assumption that past patterns will reappear.

In addition to your reactions about the estimates in the table, it would also be very helpful to us to have your thoughts about what kinds of projections beyond age 70 (if any) the committee would find useful.

AGE of FACULTY

		YEAR	70	69	68	67	66	65	64	63	62	61	60	59	58	57	56	55	54	
ACTUAL	1	1980-81	0	1	5	3	12	7	6	18	11	9								
	2	1981-82	1	4	3	12	6	5	17	10	8	13								
	3	1982-83	4	3	10	6	4	17	10	8	13	10								
	4	1983-84	3	10	6	4	16	10	8	12	11	18								
	5	1984-85	6	5	4	14	8	7	12	10	18	17								
	6	1985-86	5	4	13	7	6	10	10	18	14	22								
	7	1986-87	3	10	6	6	8	9	17	13	20	10								
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	9	1988-89	4	4	6	8	15	11	18	10	19	21	22							
	10	1989-90	4	5	8	14	10	17	10	18	20	21	22							
	11	1990-91	5	7	13	9	16	9	17	20	20	21	22							
	12	1991-92	6	11	8	16	9	17	19	20	20	21	22							
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THE
GEORGE
WASHINGTON
UNIVERSITY
Washington, D.C. 20052 / The National Law Center

MEMO TO: Thomas D. Quinn, Esq.

FROM: Professors Cheryl Block (Law) and Robert Goldfarb (Economics)

RE: George Washington University Special Committee on Mandatory Retirement

DATE: March 12, 1987

We have been asked to serve on a "Legal Liason" subcommitte of the newly created Special Committee on Mandatory Retirement at George Washington University. This Committee was established by the University Faculty Senate to respond to recent changes in the Age Discrimination Act requiring the elimination of mandatory retirement at age 70. (A copy of the Resolution establishing and charging the Committee is attached.)

At present, the Committee is in the early stages of its work and has not developed any specific proposals. Nevertheless, we have numerous legal questions regarding the parameters within which we are free to work under the amendments to the Age Discrimination Act. Before we go much further in our deliberations, we need some legal guidance. It is our hope that you can provide us with some general guidance at the outset and then more particular advice as we develop more precise proposals.

Our subcommittee has begun to identify some of the legal issues of concern to us. What follows is a description of these issues. It would be quite helpful to the Committee if you would respond in writing and perhaps attend one of our meetings at your convenience to discuss these issues.

I. General Information

Information regarding the general mandates of the recent changes to the Age Discrimination Act would be very useful to the Committee. Specifically, some general guidance as to what the University <u>must</u> do and what it <u>may</u> do in response to the recent changes in the law would be helpful.

II. More Specific Issues

A. Status of Individuals Reaching the Age of 70 Who Were Previously Granted Tenure

It is our understanding that the recent changes to the Age Discrimination Act require that mandatory retirement at age 70 be abolished by the University by 1994. This mandate raises numerous issues for our Committee:

1. What Procedures Must Be Followed When a Tenured Member of the Faculty Reaches 70 and Wishes to Continue Working?

Suppose that an individual reaches the age of 70 after 1994 and wishes to continue working, but the University views it as desirable that the individual retire. On what grounds can the University require the individual to retire? Could the University require that individual to take a part-time position? What procedures must be used to assure due process? Can a different set of procedures be established for those beyond a certain age? For example, would it be permissible to establish an annual certification process for those beyond a certain age? If a formal certification process was adopted, would outside evaluators be necessary?

There are already in place various procedures for denial of tenure for cause. Must the identical procedures be used for those over 70 after 1994? If so, can the "for cause" procedures now in place be changed retroactively so as to apply to all tenured faculty at the University?

What guidance should be given to Department Chairs and Deans regarding yearly renewals? For example, such officials might give those beyond a certain age lower salary increments in an effort to "force" retirement. On the other hand, such lower increments may be a genuine response to a lessening of the particular individual's productivity.

2. Continuation of Benefits.

Must the University continue benefits (such as health and medical) for those who reach the age of 70 and voluntarily choose to retire? What about those individuals who opt to work part-time after 70?

B. Status of Existing and New Tenure Track Contracts

If an individual is currently employed in a tenure-track position but has not yet been granted tenure, can a

form of long-term tenure (10 years, for example) be granted which would expire at a certain point in the future following which the individual would be on a year-to-year contract? If this cannot be done for those currently in tenure track positions, could the University begin writing such contracts for new employees? What pitfalls must the University watch for in designing such contracts? Are there other forms of legally acceptable "tenure like" guarantees that might self-destruct at high ages or after a fixed-term?

C. Incentives to Retire: Buy-Outs

Is it permissible for the University to arrange "buy-out" packages specifically designed to encourage older faculty members to retire early and to make room for younger faculty? What legal pitfalls must the University watch out for in designing such packages? Some members of the Committee have expressed concern that an individual might take advantage of an attractive financial package and then go to teach at another University in the area. Would it be permissible for the University to include a contractual "covenant not to compete"as a condition of such a buy-out?

The above listing of concerns is not comprehensive. We would of course be interested in and welcome any other insights you would care to offer.

cc: Dr. Arthur D. Kirsch (Statistics)
Chair, Special Committee on Mandatory Retirement

M E M O R A N D U M

DATE: September 3, 1987

TO: Cheryl D. Block and Robert Goldfarb

FROM: Vincent C. Burke, III *VCB*

RE: Special Committee to Study Mandatory Retirement
Legal Liaison Subcommittee

The resolution establishing the Committee sets forth the issues raised by the recent amendments to the Age Discrimination in Employment Act ("ADEA" or "Act") 29 U.S.C. Sections 621-634. Prior to 1994, what policy should the University adopt vis-a-vis tenured faculty members who reach the mandatory retirement age of 70 but wish to continue to teach thereafter? Until 1994, the University can clearly enforce the mandatory retirement age. Should it, in light of the fact that come 1994 it will not be able to do so unless Congress decides otherwise? What effect will the removal of mandatory retirement have on the system of continuous tenure?

The Committee's specific charge to study these issues necessarily involves legal questions, some of which would appear quite complex on the surface. Several of the selected areas of study seem to involve suggested changes in the compensation, terms, conditions, and/or privileges of employment of senior tenured faculty members. Such changes would appear to have as a goal reducing the ranks of senior faculty through early retirement or providing some degree of change in their status.

On the face of it, such actions clearly are within the scope of the Act. For the benefit of the Committee, I think it appropriate to provide a brief overview of the ADEA.

The ADEA makes it unlawful for an employer to:

1) fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age; or

3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C. Section 623(a). The ADEA protects persons over the age of 40.

There are several exemptions to the above prohibitions, only one of which is relevant to the Committee's inquiry. The ADEA does not prohibit the compulsory retirement of an employee who is at least 70 years of age and who is serving under "a contract of unlimited tenure" or a similar arrangement providing for unlimited tenure at an institution of higher education. 29 U.S.C. Section 631(d). This provision expires in 1993.

In a typical ADEA law suit, the plaintiff bears the burden of establishing a <u>prima facie</u> case of discrimination. The plaintiff can do this by showing 1) he is a member of the protected group (i.e., over 40); 2) he was discharged; 3) he

was replaced by a person outside the protected group; and 4) he was qualified to do the job. The plaintiff must present evidence sufficient to create a reasonable inference that age was a determining factor in the employment decision.

If a prima facie case is made, the burden shifts to the defendant to provide a non-discriminatory justification for its actions. There are seven basic defenses to an ADEA action:

1. No discrimination--actions were neither based on age nor had a disparate impact on protected age group.

2. For good cause--individual was discharged for good cause.

3. Bona fide occupational qualification--age is an express employment criterion which is reasonably necessary to the normal operation of the particular business and all or substantially all persons within the class would be unable to perform the job's duties safely and efficiently.

4. Business necessity--challenged practice is justified on the basis of business necessity, reasonable factors other than age. Such factors may include physical fitness, education, and quantity or quality of production. Job performance can be a valid reason for discharge.

5. Bona fide employee seniority system--an employer may observe the terms of bona fide seniority system. The system must be based on length of service as the primary criterion.

6. Bona fide employee benefit plans--plan must not be subterfuge to evade purposes of ADEA and must not require or permit the involuntary retirement of any individual because of his age.

7. Waiver--waiver of statutory rights pursuant to a settlement agreement may be a valid defense.

Assuming defendant puts forth one of the above defenses, the burden shifts back to the plaintiff to rebut defendant's reason for the employment decision and show by a preponderance of the evidence that age "made a difference in the employer's decision."

Inasmuch as we are dealing with potential changes in the terms, conditions, or privileges of employment of persons covered by the ADEA, any measures to be taken must be considered in the above context.

With this in mind, I would now like to respond to your memorandum to Mr. Quinn of our office.

With respect to your memorandum, addressing your questions in order, I respond as follows:

I. General Information.

What the University must do and what it may do in response to the recent ADEA amendments.

The effect of the amendments is to preserve the status quo in the area of higher education in the area of tenured faculty until December 31, 1993. Therefore, there is no duty on the University to do anything during the interim period with regard to tenured faculty. Under the University's existing system, tenured faculty reaching the age of 70 may be mandatorily retired up to December 31, 1993.

The amendments to the Act extend protection from age-based employment decisions to non-tenured faculty. The University must abide by the law as to all non-tenured employees.

In anticipation of the expiration of the tenured faculty exemption, the University may institute changes in its employment retirement system which comply with the ADEA. Some of the suggestions that have come forth as reported in various articles on the subject and in your memorandum involve material modification, if not termination, of the tenure system itself. I think any such activity is premature.

By its terms, the amendment commissions a study by the EEOC together with the National Academy of Sciences to analyze the potential consequences of elimination of mandatory retirement on institutions of higher education. The study panel is to consist of four administrators, four faculty members, and one person selected by NAS. The law requires the study panel to begin work by October 31, 1987, and report its results and recommendations to Congress and the President by October 31, 1991. The study panel is not yet in place and work has not begun.

The AAUP intends to develop guidelines that might apply to tenured professors during the interim period. AAUP has completed a first working paper which basically raises the issues to be addressed. I have requested a copy of this working paper. AAUP will also be participating in studies

with the Association of American Colleges and the Association of American Universities.

I think it would be important to have the benefit of the work of the above groups prior to the Committee's recommending any material change in the status quo. I am not convinced that Congressional extension of the exemption is not an alternative.

II. A. Status of Individuals Reaching The Age of 70 Who Were Previously Granted Tenure.

If Congress determines not to extend the tenure exemption, a tenured faculty member reaching age 70 after January 1, 1994, could not be forced to retire if his age were a determining factor in the decision to retire him. A tenured faculty member 70 or over could continue teaching for as long as he was otherwise qualified to do so. Any changes in such a faculty member's compensation, terms, conditions, or privileges of employment would have to pass muster under the ADEA. That is, the age of the individual could not be a determining factor behind the change.

Requiring such a faculty member to take a part-time position due to his age would violate the ADEA. An annual certification process, which would be based on a person's age, would also appear to violate ADEA. Any proposed action in this context must come within the seven areas of defense outlined above.

Tenured faculty members who voluntarily retire or who are mandatorily retired at 70 prior to 1994 could, if the University desired, take retirment and then return to work as a non-tenured employee. As such, they would not be entitled to protection of tenure but would come under the protection of the Act.

If a person voluntarily retires and stays retired, he is no longer an employee and not protected by the ADEA. Whatever contractural arrangement the University has under its retirement plan as to fringe benefits would, of course, have to be honored.

B. Status of Existing and New Tenure Track Contracts.

For the reasons stated previously, I think it premature to do anything which would fundamentally alter the existing tenure system at this time.

C. Incentives to Retire: Buy-Outs.

Buy-out packages which are totally voluntary should not present an ADEA problem. The key is whether the option is truly voluntary. If it were deemed desirable, a reasonable covenant not to compete could be included in any such package.

In addition to the areas of study mentioned in your memorandum, I have come across some suggested alternatives. These include:

Develop an attractive early retirement program

Phased early retirement plans

Continuation of fringe benefits for early retirees

Defined benefit plans rather than defined contribution plans

Increase the percentage of "final salary" as provided by existing retirement plans

Create special Emeritus status programs such as:

Hastings Law School "Over 65 Club"

Stanford research stipends program.

Due to the complexity of the issues involved, I would suggest the Committee develop a strategy to identify the key issues, task appropriate persons to study such issues in depth, and provide reports on each specific issue from which the Committee could distill the salient points and incorporate them in an overall Committee report.

The legal research I have done thus far is preliminary. As we progress and more clearly identify the issues, I will be able to provide more definite advice.

I look forward to working with the Committee and am available to attend meetings if you desire.

Sincerely,

Vincent C. Burke, III

VCB:srh

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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WASHINGTON, D.C. 20005
(202) 737-5900

October 22, 1987

Professor Arthur Kirsch
Department of Statistics
George Washington University
Washington, D.C. 20052

Dear Professor Kirsch:

Here, as promised, is a copy of our "Working Paper on the Status of Tenure Without Mandatory Retirement."

Please feel free to contact me again if I can be of further assistance. We are interested in learning what your committee finds out about faculty retirement patterns at George Washington and at other Washington-area colleges.

With good wishes.

Sincerely,

B. Robert Kreiser

B. Robert Kreiser
Associate Secretary

BRK:sf
Enclosure

R E P O R T S

Working Paper on the Status of Tenure Without Mandatory Retirement

At its meeting in June 1987, Committee A on Academic Freedom and Tenure approved publication of the following paper, prepared by the undersigned subcommittee, for the information of the profession. Committee A will welcome comments, which should be addressed to the Association's Washington office.

I. General Considerations

What are the implications for the institution of tenure of forbidding mandatory retirement on account of age? That is what Congress has done, in 1986 amendments to the Age Discrimination in Employment Act (ADEA) of 1967. But this "uncapping," as it is often called, is deferred for seven years with respect to employees in institutions of higher education with "contract[s] of unlimited tenure." Until January 1, 1994, they may be subject to compulsory retirement on attaining age seventy. Seventy as a minimum mandatory retirement age became applicable to tenured faculty members in 1982, to all others in 1978. Before that the ADEA protected only those between forty and sixty-five. The academic community has already experienced one delay in raising the cap for tenured faculty; we cannot begin to know with certainty the consequences of complete uncapping on a national scale until after 1993. Meanwhile, several states have uncapped without any tenured faculty exemption (Florida, Hawaii, Maine, Utah, and Wisconsin); and others may follow suit.

The prospect of truly unlimited tenure stimulates phantasms of doddering nonagenarians clinging to their podiums, irremovable because they have tenure, and thwarting the appointments of younger scholars. The subcommittee believes that such a prospect is indeed phantasmagorical. Most faculty members in most institutions retire before they reach seventy. In American society generally, the trend for some time has been toward earlier rather than later retirement. Much of the alarm about uncapped academe has nothing to do with the presence or absence of tenure. It is rather stirred up by the underlying public policy that forbids any discrimination on account of age—a policy that, when its time came, sailed through the Congress almost without dissent.

In higher education, however, complaints abound that retention of faculty beyond age seventy will be financially burdensome, at a time when there is already wide hostility to the level of tuition, and when (as always) there is very little leeway in academic budgets. Senior faculty members are likely to have the highest salaries. The conventional expectation is that the appointment of a junior replacement can be made for half the price; the tacit assumption is that youthful vigor will serve as well as experienced judgment. That older employees are more highly paid is of course not a phenomenon peculiar to higher education. That they cannot be so readily replaced with cheaper brains and hands is a consequence of proscribing mandatory retirement; it has nothing to do with tenure.

Another concern raised by uncapping is that senior faculty members, now and for some time to come, are and will be predominantly white males. Their retention precludes their replacement by women and minorities, both still underrepresented in the academic world. This concern carried to its conclusion, implies that discrimination on account of age is acceptable *if* it will redress discrimination on account of sex or race. The lawmakers have made no such judgment. Again, the problem has nothing to do with academic tenure. Although the recruitment of women and minorities is a matter in which the American Association of University Professors is deeply concerned, it is not directly relevant to the problems that this report addresses (and in any event there is no assurance that replacements for senior faculty members *would* be women or minorities).

The existence of tenure does become relevant to the uncapping issue in two ways. First, it can be said that for the incumbent tenured professoriate there was a kind of social compact that the conferral of tenure carried an understanding that the recipient would accept retirement at a determined age. That certainly had been the understanding. Indeed, the Association has long been on record as calling for "a fixed and relatively late retirement age." But the acquiescence in a late retirement age has now been superseded by the public policy barring involuntary termination on account of age. Even if the understanding was expressed in a contract, the new understanding makes that contract unenforceable. If an incumbent tenured faculty member were still obliged to retire because of a commitment made earlier in his or her career, then the ADEA would have no force in academic employment, and the seven-year deferral would have been unnecessary. The unavoidable conclusion is that the ADEA trumps all outstanding obligations to retire at a certain age.

The second tenure-related objection to uncapping does get to the heart of the matter: the asserted dif-

provision is made for a jury trial under the ADEA. Like Title VII, provision is made for attorney fees should the plaintiff prevail against the employer. But unlike Title VII, in age cases the amount of actual damages, i.e., lost income and benefits less mitigation, are doubled upon a judicial determination of "willfulness." The Supreme Court has held that "willfulness" for these purposes is knowledge that the course of action is impermissible under the ADEA or was taken in disregard of whether the action was prohibited.

Although some courts seem to give greater deference to subjective employer evaluation under the ADEA than under Title VII (and even under Title VII the courts have proved highly deferential to institutional judgments about faculty in higher education), the adoption of Title VII's approach to a prima facie showing of disparate treatment, the availability of a jury trial, the provision of attorney fees, and the doubling of damages for willful violations place in issue the assumption that means can be devised easily to dispose of older faculty members. It is likely that a faculty member with decades of institutional service will be able readily to establish a prima facie case of age discrimination sufficient to compel the employer to produce its evidence to justify the termination.

In sum, the adoption of devices that seemingly make it "easier" to terminate the appointments of older faculty members than would a hearing to demonstrate cause may simply shift the forum for adjudication from an intramural to an extramural one, to a process much more highly structured, time consuming, and expensive.

III. The Impact of Uncapping

It is almost idle to speculate about the behavior that will follow uncapping in 1994. Probably the most acute disturber of existing trends would be a revival of high levels of inflation, or of expectations of high levels of inflation. Inflation operates to cut the purchasing power of pensions and to impel people to think that they cannot afford to retire. To be sure, the bite of inflation can be blunted by cost-of-living adjustments by legislatures for holders of fixed-benefit pensions. Even for defined contribution pensions, notably those of TIAA-CREF, the CREF variable annuity may ride upward with inflation—so long as the stock market does too. Still, inflation and fears of inflation may be expected to affect retirement decisions. Since the subcommittee can say nothing plausible about inflation rates years hence, it can say nothing reliable about retirement decisions.

The subcommittee notes with regret that, except for the work of Hansen and Holden at the University of Wisconsin, there is very little useful material available on current retirement decisions in higher education. When Congress extended the permissible mandatory retirement age from sixty-five to seventy in 1978, and delayed the application of that change to tenured faculty members until 1982, the Association issued a valuable report prepared by its Special Committee on Age Discrimination and Retirement (*AAUP Bulletin*, September 1978, p. 181), which included sophisticated projections of the consequences of raising the mandatory retirement age to seventy. Five years have passed since that change occurred. What has happened? How many faculty members have postponed retirement beyond the age when their institutions previously required it (or when they would have voluntarily retired)? What has been the cost of such deferred retirement, in money terms and in new appointments that had to be foregone (assuming constant compensation budgets)? This subcommittee had hoped to get some data from TIAA-CREF, but it was told that for a number of reasons (the chief one being the significant portion of policyholders in TIAA-CREF who are not faculty members) nothing could be provided.

The subcommittee hoped also to learn something from the experience in the states that have already uncapped; but its inquiries again have produced nothing, except for an April 1986 report of an *ad hoc* retirement study committee at the University of Wisconsin-Madison. From this it learned that in the academic year 1984–85, the first year of uncapped retirement, five out of nine faculty members who reached age seventy chose not to retire. The subcommittee was also informed that at Yale University (with a firm mandatory retirement-at-seventy policy in effect) 80 percent of those who retired over the course of three recent academic years waited to age seventy to do so.

These tidbits support a hunch that the numbers of those deferring retirement past seventy, when uncapping comes to all campuses, may well be largest at research universities and elite colleges, where teaching loads are relatively light and research interests strong. The costs of uncapping may accordingly be higher at such influential institutions and impel them to consider harmful alterations to tenure.

The question of cost has been further exacerbated by a very recent congressional decision that was doubtless benignly intended, but that can lead only to added burdens when faculty members stay on beyond "normal retirement age." Until recently, many institutions took the position that an employer could discontinue pension contributions after age sixty-five, or after its "normal retirement age" if that lay between sixty-five and seventy. But from January 1, 1988, neither pension contributions nor accruals under defined benefit plans may be discontinued on account of age.

The goal of a rational pension plan is to assure an adequate pension with some settled relationship to one's salary. The *Statement of Principles on Academic Retirement and Insurance Plans*, issued jointly by this Association and the Association of American Colleges, proposes that a pension combined with Social Security benefits should yield an after-tax income with a purchasing power equal to two-thirds of after-tax income before retirement. The new obligation to continue adding to pension benefits indefinitely, if a faculty member chooses not to retire, distorts rational pension planning, in that prolonged accumulations will result in pensions swollen beyond reasonable needs. It increases the financial burdens of uncapping, and is likely to intensify pressures to find ways to circumvent uncapping.

To return to the main concern of this section, the undeveloped state of research and knowledge regarding probable retirement behavior after 1994—or before 1994 for that matter—is a deficiency that approaches scandal. One thing that Congress did do wisely was to call for a study, to be directed by the National Academy of Sciences (NAS), "to analyze the potential consequence of the elimination of mandatory retirement on institutions of higher education." The results of the study are to be reported to Congress in five years, thus giving time for Congress to consider

ficulty of removing tenured faculty. All that tenure means, at bottom, is that a tenured faculty member cannot be removed (absent medical disability, financial exigency, or discontinuance of a program) unless *adequate cause* is established.

The ADEA also permits removal for "good cause." Under the ADEA, there may be a shift, favorable to the employer, in the burden of proof of establishing cause. This will presently be explicated. Essentially, after 1993 the position of a faculty member who claims the protection of the ADEA will be the same, whether or not he or she has tenure, has been deprived of tenure, or never achieved tenure.

The central theme of this report, therefore, is this: if decision makers in higher education believe that uncapping retirement will be harmful, the harm flows from the public policy of forbidding dismissals on account of age, not from the fact that most elderly professors have tenure. However, the fact that the institution of tenure is widely *perceived* as exacerbating the harm that uncapping is expected to cause may make tenure a more likely target for these academic decision makers.

II. Challenging Dismissals under Tenure and under ADEA

At this point it is appropriate to amplify the suggestion in Part I of this report that the abrogation of tenure, by whatever means, would not make it significantly easier to get rid of older faculty members.

Tenure means that a dismissal during the term of service can be effected only upon showing of incompetence or inability to perform, tested before a faculty hearing tribunal through procedures akin to a trial, with the burden of proof resting upon the administration. Because tenure requires such a showing, it is legally as well as politically difficult to dismiss a tenured professor. In no other way could academic freedom be safeguarded save by assuring that the ground for termination is valid and demonstrable, especially when the ground asserted is incapacity.

Unless the decline in ability of an elderly faculty member is pronounced, making the case will be difficult. In any event, the proceeding will surely be painful for all the participants. It would not be relevant to show that a less expensive replacement could be found, nor would it be probative of incapacity to suggest that a replacement could do better.

Would the path be any easier if the professor, deprived of tenure, had to take shelter under the ADEA? On the whole, probably not. "Good cause" would still be the test (the other statutory defenses available under the ADEA—"reasonable factors other than age," "bona fide occupational qualification," or "bona fide seniority system"—could rarely be brought to bear in an academic case). To be sure, when the dismissed professor has to turn to the courts to establish a violation of the ADEA, the ultimate burden of establishing the *absence* of good cause rests on the complainant, unlike the intramural tenure case, where the administration has to demonstrate cause for removal. But the path to judgment in an ADEA case is tortuous, and along it lie pitfalls for the defending administration, such as the plaintiff's right to trial by jury, and the defendant's exposure to double damages if the dismissal is found to be "willful."

Here is a survey of that path (the reported cases applicable to an academic setting are still very few.) The prohibitions of the ADEA are modeled upon Title VII of the Civil Rights Act of 1964, dealing with discrimination on grounds of race, sex, religion, or national origin; and, not surprisingly, the courts have tended to look at the law developed under Title VII as a starting place for analysis under the ADEA. Under Title VII there are, generally speaking, two approaches to proving a violation of the act in the absence of unequivocal evidence (or "smoking gun") that a prohibited consideration played a role in the decision. A plaintiff may establish a "prima facie" case of disparate treatment by showing that he or she was in the protected class, was performing satisfactorily, was discharged, and the duties assigned to a nonminority employee or the position held open; in reduction-in-force cases the last requirement obviously is modified. This proof creates an inference that an impermissible consideration explains the decision. The burden then shifts to the employer to "articulate" a legitimate, nondiscriminatory reason for the action. Even if it does so, the plaintiff may nevertheless override that explanation by a showing of pretext, for example, that the reason given was not actually applied, or that a pattern of discrimination exists that places the good faith of the articulated reason in doubt.

In contrast to this disparate-treatment approach is the theory of disparate impact; that is, that an employer policy which appears neutral on its face may work a disproportionate burden upon the protected class. Once that showing is made, the employer must show that the policy is justified by "legitimate business necessity." If the employer is able to make such a showing, the plaintiff may nevertheless prevail if he or she can show that the proffered business necessity is pretextual, for example, that the same business purpose could be served by other means having less drastic impact upon the protected class.

The United States Supreme Court has not passed upon the question whether the disparate-impact theory is applicable under the ADEA; but three courts of appeals have applied it—one in a case of faculty retention in higher education. Nor has the Supreme Court resolved the differences between several of the circuits on the application of the disparate treatment "prima facie case" standard. The leading view is that a prima facie case is established if the plaintiff can show that he or she is a member of the protected class, was performing satisfactorily, was discharged, and was replaced in specific duties by someone substantially younger.

To be sure, the question of adequacy of performance may be the pivotal issue; but the plaintiff is not required to negate the employer's defense in order to make a prima facie case. The weight of authority, according to a leading commentator, is that "proof that *up to the point of discharge* the plaintiff was doing satisfactory work establishes that the plaintiff was 'qualified.'" Indeed, the plaintiff's very longevity may establish qualification, shifting the burden of proving "good cause" or "reasonable factor other than age" to the employer. Further, in discharge cases it is not always obvious that a younger person assumed the plaintiff's duties. Nevertheless, evidence that the discharge started a chain of events "that ultimately created a vacancy filled by a younger employee" may suffice.

Unlike Title VII, which is tried before a federal judge,

whether any legislative adjustments are necessary before uncapping occurs in 1994. In the meantime, complete dependence should not be placed on the NAS panel, which has yet to be constituted as of this writing. Other organizations in the higher education community should also pursue the matter. The Association is interested in cooperating with the NAS or with any other responsible academic organization interested in conducting a major study of this problem.

Until the panel called for in the ADEA is created and begins producing data, or until other scholarly investigators tackle the problems, very little can be usefully said about the likely impact of uncapping.

IV. Conclusion: Little Cause for Alarm

The subcommittee has already demonstrated, in Part II of this report, that tinkering with tenure is not going to make it substantially easier to end the service of professors over age seventy who are reluctant to retire. Nevertheless, the academic community will probably be confronted with a recrudescence of proposals for abandoning tenure, or for replacing it with successive terms, miscalled "term tenure," or for long-term tenure with a fixed termination time. The last of these has some appeal (although one cannot say with assurance that it will satisfy the language and intent of the ADEA). On the surface, there is nothing wrong with an uncoerced agreement to retire at a certain time. But if that time is thirty-five or forty years away, and if the agreement to retire in thirty-five years is a condition of the initial conferral of tenure, one has to ask if the proposed bargain is not one which may be simultaneously seductive and coercive. One must also ask whether this Association could ever countenance such a practice unless it contained ironclad safeguards against invidious manipulation.

If the community of higher education wants to diminish the costs of having faculty members stay on past age seventy, it should start now to develop and utilize known methods of making truly voluntary incentives to retire earlier rather than later—so-called buyouts. The subcommittee is aware that buyout arrangements are not inexpensive. Moreover, the new tax laws have seriously impaired the feasibility of these buyout arrangements, since lump-sum buyouts will apparently be taxable in the year in which they are paid. It will require deep study to determine, in any given setting, what is feasible and economically rational. Further, the ADEA bristles with legal problems about the propriety of selective buyouts. These, targetting people who are thought to be slipping or unproductive or redundant, are advantageous for administrations seeking to avoid throwing money at people whom they would prefer to retain. But a buyout may be discriminatory if it is not made generally available. The subcommittee is not ready to venture opinions on this or any other unsettled legal issues under the ADEA.

The next device that is worth increased attention is flexible phasing-out arrangements. A faculty member can over a short span of years cut back incrementally on his or her work and salary, while commencing to draw Social Security or pension payments as it becomes convenient to do so. Phase-out arrangements, if they are voluntary and even-handedly available, do not at first blush appear to attract legal complications. There is already substantial experience with and literature about both buyouts and phaseouts; they are not novelties.

As still another way to encourage retirement, institutions may wish to consider redesigning their retirement plans by shifting to a modified defined contribution plan, including an agreed-upon ceiling on pensions and improved long-term health-care benefits. Such a shift might be an attractive alternative to the present defined contribution plans which, as has been shown, have a bias against retirement in that faculty members can continue to require indefinite institutional contributions to their retirement pension.

The third road worth travelling is the least costly and controversial: make the status of retirement more attractive. The case for expanded rights and privileges for emeriti has recently drawn attention. It costs very little to let a retired faculty member continue to feel and be part of the academic community. To be sure, office space and research facilities are not costless; but if the retired professor is productive their provision is a gain, not a burden, for the institution. Ingenuity and contrivance are called for; it is probably no accident that the report of the Wisconsin-Madison retirement study committee, earlier noted, concluded with a detailed discussion of parking-space problems. Local policies, modeled on those outlined in the "Bill of Rights for Emeriti" (*Academe*, July-August 1986), can be worked out on a local basis as guidelines for the treatment and status of retired faculty members.

It does seem to be the case that professors live longer and stay healthy longer than other components of the workforce. It also seems to be true that a considerable portion of them seek late retirement. Retirement at age seventy does not appear to be causing any strains in the system. How many will stay past seventy, and for how long, is not now knowable. It is known, however, that everyone past seventy has a shortening lease on energy and life. Those who stay on will drop off. The extra cost of retaining senior people is not cumulative, once a new cycle is established. The opportunities to appoint young people are not lost; they are deferred.

The subcommittee does not mean to suggest that uncapping will not create problems and impose costs. But the subcommittee does urge that attention first be paid to solving the problems and cutting the costs by means that do not impair tenure. Uprooting tenure would do grave damage to academic freedom and collegiality. And, as this report shows, cutting off tenure will not be an effective way to circumvent the law as declared by the ADEA.

The Association must remind the community of higher education that tenure procedures have largely been upheld by the courts, and that any serious tampering with tenure provisions and procedures will open the academy to a wave of external and judicial involvement. Above all, the Association must reaffirm the importance of tenure for the health of the profession, and for the long-term prospects of high-quality recruiting into academic ranks.

RALPH S. BROWN (Law), Yale University, *Chair*

B. ROBERT KREISER (History), Association Staff

JOEL T. ROSENTHAL (History), State University of New York at Stony Brook

PETER O. STEINER (Economics), University of Michigan

ADMINISTRATIVE STANDING COMMITTEES

January, 1988

THE GEORGE WASHINGTON UNIVERSITY
Washington, D. C.

TO: Members of the University Faculty Assembly

FROM: Lilien F. Robinson, Chairman, Executive Committee of the Faculty Senate Lilien F. Robinson

SUBJECT: Appointments to Administrative Standing and Special Committees for the Year 1988-89

At its April and May meetings the Faculty Senate will recommend faculty for presidential appointment to membership on certain Administrative Standing Committees listed below. When the Executive Committee meets in March, it will draw up a list of faculty nominees for approval by the Senate.

If you are interested in volunteering your services--and I urge you to give the matter serious consideration--please indicate your preference and return this form to: FACULTY SENATE OFFICE, RICE HALL, #403B, no later than March 14, 1988.

Advisory Committee for the Charles E. Smith Center for Physical Education and Athletics
Committee on Campus Security
Committee on the Judicial System
Committee on Public Ceremonies
Committee on Sponsored Research
Committee on Student Publications
Committee on University Bookstore
Committee on University Parking
GW Forum
Joint Committee of Faculty and Students
Marvin Center Governing Board
Marvin Center Program Board
Panel for Student Grievance Review Committees
Presidential Appeals Board
Student-Faculty Committee on Appeals

Name ______________ Department ______________ Rank ______________

Presently serving on the Administrative Committee on: ______________

Do you wish to be re-elected to this Committee ___ Yes No ___

I should wish to serve on an Administrative Committee within the time limitation noted below. I prefer service on one of the following committees:

(1st Choice) ______________________________
(2nd Choice) ______________________________
(3rd Choice) ______________________________

I will be available for committee work during the regular academic year _____

I will also be available for committee work during at least one on the summer sessions _____

I prefer not to serve during 1988-89 _____

FACULTY SENATE STANDING COMMITTEES January, 1988

THE GEORGE WASHINGTON UNIVERSITY
Washington, D. C.

TO: Members of the University Faculty Assembly

FROM: Lilien F. Robinson, Chairman, Faculty Senate Executive Committee Lilien F. Robinson

SUBJECT: Call for Nominees for Election to Faculty Senate Standing Committees, 1988-89 Session

In April, the newly-elected and incumbent Executive Committee of the Faculty Senate will meet jointly "to nominate the members and chairmen of the standing committees and special committees" of the Faculty Senate for the year 1988-89.

I urge all colleagues seriously to consider volunteering their service to one of the following Senate Committees during the forthcoming year. Please keep in mind that in the interest of "continuity" in committee membership, the Senate amended its Bylaws to read: "...elected members should consider it an obligation to stand for re-election to the same committee at least once." If you wish to be elected or re-elected to a Senate Committee, this form must be returned to the FACULTY SENATE OFFICE, RICE HALL, #403B, NO LATER THAN March 31, 1988.

Administrative Matters as They Affect the Faculty
Appointment, Salary and Promotion Policies (including Fringe Benefits)
Athletics
Educational and Admissions Policy
Fiscal Planning and Budgeting
Grievance Committee (3-year term)
Honors and Academic Convocations
Libraries
Physical Facilities
Professional Ethics and Academic Freedom
Research
Student Financial Aid
University Development and Resources
University and Urban Affairs

Name____________________ Department______________ Rank____________

Presently serving on the Senate Committee on:______________________

Do you wish to be re-elected to this Committee? ___ Yes No ___

I should like to serve on a Senate Committee in the following order of preference:

(1st Choice) ____

(2nd Choice) ____

(3rd Choice) ____

I will be available for committee work during the regular academic year _____

I will also be available for committee work during at least one of the summer sessions _____

I prefer not to serve during 1988-89 _____